Nos. 99-5 & 99-29

Supreme Court, U.S.
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In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

vs.

ANTONIO J. MORRISON, ET AL.,

Respondents,

and

CHRISTY BRZONKALA,

Petitioner,

vs.

ANTONIO J. MORRISON, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE STATES OF ARIZONA, ALASKA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, GEORGIA, HAWAII, ILLINOIS, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, OREGON, RHODE ISLAND, TENNESSEE, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, AND WISCONSIN, AND THE COMMONWEALTHS OF MASSACHUSETTS AND PUERTO RICO, AS AMICI CURIAE IN SUPPORT OF PETITIONERS' BRIEF ON THE MERITS

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INTERESTS OF THE AMICI STATES

The issue presented in this case – the validity of 42 U.S.C. § 13981, the provision of the Violence Against Women Act of 1994, 42 U.S.C. §§ 13931 to 14040 (1994) ("VAWA") that creates a private right of action for victims of gender-motivated violence – is critical to the thirty-six Amici States and the Commonwealth of Puerto Rico. As employers of women and providers of services necessitated by domestic violence, the Amici States are directly and substantially affected by the monetary and other harm that results from violence against women.

Amici also have a strong public policy interest in the Court upholding Section 13981, which ensures that victims of gender-motivated violence receive as complete a remedy as possible. Amici therefore support the continuing cooperative efforts between state and local government on the one hand and the federal government on the other to reduce its occurrence to the greatest extent possible. This past summer, the National Association of Attorneys General supported the reauthorization of VAWA because the statute both has changed the way the nation addresses the crimes of domestic violence and sexual assault and has made a positive difference in thousands of women's lives. *Resolution of the National Association of Attorneys General* (June 23-26, 1999). At the same time, the Attorneys General recognized that domestic violence continues to be a major cause of injury to women and that reauthorization is necessary to "continue the commitment that Congress has made to eliminate the epidemic of domestic violence and sexual assault in this country." *Id.*

SUMMARY OF ARGUMENT

In concluding that Congress exceeded its Commerce Clause authority in enacting 42 U.S.C. § 13981, the Court of Appeals for the Fourth Circuit erroneously disregarded the extensive congressional findings that demonstrate that violence against women substantially affects interstate commerce. The Fourth Circuit's reasoning – that Section 13981 is not within Congress's commerce authority because it does not regulate an economic activity or include a jurisdictional element – is inconsistent with the "substantial effects" test set forth in *United States v. Lopez*, 514 U.S. 549, 559 (1995). The congressional findings that violence against women impacts interstate commerce are compelling and consistent with the findings of numerous, subsequent reports and the States' own experience. Because violence against women substantially affects Amici States by interfering with women's employment and by creating tremendous needs for medical and governmental services, Amici urge the Court to hold that Section 13981 is within Congress's commerce powers.

Further, in enacting the private right of action in Section 13981, Congress chose a particularly appropriate remedy for the harm caused by gender-motivated violence. The States' own studies demonstrate that their efforts to combat gender-motivated violence, while substantial, are not sufficient by themselves to remedy the harm caused by such violence or to eliminate its occurrence. Moreover, Section 13981 does not undermine federalism because the private right of action in Section 13981 complements state and local efforts to combat violence against women. The potential for parallel state and federal remedies for gender-motivated violence that may

exist as a result of Section 13981 is similar to the parallel remedies that already exist for other forms of discrimination. Therefore, the Court should uphold Section 13981 under the Commerce Clause.

ARGUMENT

I. Congress Rationally Concluded That Gender-Based Violence Substantially Affects Interstate Commerce.

A. The Court of Appeals Erred in Ignoring Congress's Findings That Gender-Based Violence Substantially Affects Interstate Commerce.

Ostensibly relying on *United States v. Lopez*, 514 U.S. 549 (1995), the Court of Appeals for the Fourth Circuit concluded that it could ignore Congress's findings about the effect of violence against women on interstate commerce because VAWA "neither regulates an economic activity nor includes a jurisdictional element." Pet. App. at 31a. The Fourth Circuit's simplistic approach does not square with the Court's careful analysis in *Lopez*. If the Court had intended in *Lopez* to adopt a bright line test that looked only to whether the regulated activity was economic, there would have been no reason for the Court to discuss, as it did, the lack of congressional findings as to the effect of the regulated activity on interstate commerce. *See Lopez*, 514 U.S. at 563 ("But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here."). Rather, the Court concluded that "the

proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce" and noted that it must decide whether a rational basis existed to support Congress's conclusion that there is such a substantial effect. *Id.* at 559. Moreover, the Court reaffirmed that the "question of congressional power under the Commerce Clause 'is necessarily one of degree' " and acknowledged that "[t]hese are not precise formulations, and in the nature of things they cannot be." *Id.* at 566-67 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)).

Thus, in addressing the validity of the private right of action in Section 13981 under Congress's commerce powers, this Court must examine whether Congress rationally concluded that gender-based violence substantially affects interstate commerce. Because gender-based violence substantially affects state institutions and has a detrimental impact on the States' economic well-being, the State Attorneys General overwhelmingly supported the enactment of VAWA. *See Crimes of Violence Motivated by Gender: Hearings Before the Subcomm. on Civil and Constitutional Rights of House Comm. on the Judiciary*, 103d Cong. 34-36 (1993) ("1993 Crimes of Violence Hearing") (letter from 41 Attorneys General from 38 States, the District of Columbia, and two territories). The States' experience is consistent with the extensive legislative history of VAWA and with the studies of gender-based violence generated after its enactment, all of which establish that violence against women affects interstate commerce in ways that are direct and immediate.

B. Gender-Based Violence Affects Interstate Commerce by Interfering with Women's Employment.

Congress found that violence against women imposes significant costs on employers by increasing absenteeism, lowering productivity, increasing health care costs, and creating higher turnover. *See Women and Violence: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong. 29, 69 (1990) ("1990 Women and Violence Hearing") (nationally, violence against women costs employers between $3 billion and $5 billion annually due to absenteeism) (statements of Helen Neuborne and Sally Goldfarb); S. Rep. No. 103-138, at 54 n. 70 (1993) ("1993 S. Rep.") (homicide is the leading cause of death for women in the workplace); *id.* at 54 n. 69 (noting that almost 50% of rape victims "lose their job or are forced to quit in the aftermath of crime") (citing E. Ellis et al., *An Assessment of the Long Term Reaction to Rape*, 50 J. ABNORMAL PSYCHOLOGY 264 (1981)); S. Rep. 101-545 at 33 (1990) ("1990 S. Rep.") (women who remain employed after a rape or other crime of violence may experience a prolonged period of decreased productivity); 1993 S. Rep. at 41 (noting estimates that costs of domestic violence alone, including costs of victims' medical treatment, may amount to $5 billion to $10 billion dollars a year). Congress's finding that gender-based violence against women directly and detrimentally affects employers is supported by numerous, subsequent studies by both private, state, and other governmental entities, which document increased costs due to absenteeism and lower productivity,[1]

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[1] *See* EDK Associates for the Body Shop/YWCA, *The Many Faces of Domestic Violence and Its Impact on the Workplace* (1997)

increased health care payments,[2] and higher employee turn-over.[3]

(hereinafter EDK Report) (37% of women who had experienced domestic violence report this abuse had an impact on their work performance in the form of lateness, missed work, keeping a job, or obtaining a promotion); New York State Dep't of Labor, *Report to the New York State Legislature on Employees Separated from Employment Due to Domestic Violence* (1996) (hereinafter New York Report) (74% percent of employed battered women are harassed at work, 54% miss at least three days of work a month, 56% are late for work at least five times a month, and 75% use company time to call doctors, lawyers, shelters, counselors, and others because they cannot do so at home); Patricia Horn, *Beating Back the Revolution: Domestic Violence's Economic Toll on Women*, DOLLARS & SENSE, Dec. 1992, at 12, 21 (domestic violence costs employers hundreds of thousands of lost paid days of work annually) (citing a U.S. Department of Justice survey).

[2] *See* Pennsylvania Blue Shield Institute, *Social Problems and Rising Health Care Costs in Pennsylvania* 35 (1992) (the total health care costs of family violence are estimated in the hundred of millions of dollars each year, much of which is paid by employers); *see also* Catherine Wisner, et al., *Intimate Partner Violence Against Women: Do Victims Cost Health Plans More?*, JOURNAL OF FAMILY PRACTICE, 48:439 (1999) (women who were victims of intimate partner violence cost a Minnesota health plan approximately 92% more than a random sample of general female enrollees).

[3] *See* Jody Raphael & Richard Tolman, *Trapped by Poverty, Trapped by Abuse: New Evidence Documenting the Relationship Between Domestic Violence and Welfare*, at 33 (1997) (studies of abused women in Massachusetts, New Jersey, and Illinois confirm that abused women seek employment but are not able to maintain it); EDK Report at 13-14 (20% of women who experienced domestic abuse reported having difficulty keeping jobs); New York Report at 1 (domestic violence often affects a victim's employment status by contributing to the loss of a job). Employers also lose valuable women employees as a result of

Congress also found that employers have responded to the effect on "such bottom line issues as tardiness, poor performance, increased medical claims, interpersonal conflicts in the workplace, depression, stress and substance abuse" by directly addressing domestic violence in order to reduce their costs and protect their employees. *See Hearings on Domestic Violence: Hearings on S. 596 Before the Senate Comm. on the Judiciary*, 103d Cong. 15 (1993) (statement of James Hardeman, Polaroid Corp.).[4] And, consistent with the congressional finding that employers have responded to the effects of violence,

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homicide. *See* Women in Public Service, *Hidden Violence Against Women at Work* (1995) (homicide is a leading cause of death for women in the workplace); R. Bachman & L.E. Saltzman, *Violence Against Women: Estimates from the Redesigned Survey* 4 (1995) (28% of female homicide victims are murdered by an intimate or other relative). In addition, government employees are much more likely to be victims of workplace violence than other employees. *See* Greg Warchol, *Workplace Violence, 1992-96* 2 (1998) (while government employees make up approximately 16% of the national workforce, about 37% of the victims of workplace violence were employed by a federal, state, or county government organization).

[4] This congressional finding is also directly corroborated by a recent publication of the American Bar Association (ABA). ABA Commission on Domestic Violence, *A Guide for Employers: Domestic Violence in the Workplace* (1999). The ABA Commission on Domestic Violence has been working with the corporate sector to eradicate domestic violence in the United States and has found that employers embrace the ABA's efforts because "domestic violence has a direct impact on the 'bottom line' – costing U.S. companies an estimated four to five billion dollars per year in absenteeism, employee turnover, reduced productivity, higher health insurance premiums, and the like." *Id.* at 3.

States have responded to the effects of domestic violence on employers both in their capacity as major employers of women and in the interest of assisting employers within their borders. *See, e.g.*, Maryland Exec. Order No. 1.01.1998.25 (1998) (recognizing that domestic violence costs American businesses an estimated $3 billion to $5 billion annually and that the State of Maryland is affected by these costs as the State's largest employer, Maryland's Governor ordered all state agencies to provide training to their employees on how to address domestic violence problems in the workplace); *New York Report* at 9 (after studying the issue of employees separated from work due to domestic violence, the New York Department of Labor concluded that domestic violence "is a serious problem with significant impact on the workplace and it requires collaborative efforts by victims, their advocates, government, employers and labor unions"); Leslie Landes, *Domestic Violence Affects Workplace*, CHICAGO TRIBUNE (Oct. 1, 1999) (City of Chicago has created a comprehensive work violence policy including a domestic violence component in recognition of the need for government and business entities to assist employees who suffer from domestic violence); U.S. Dep't of Labor, *Facts on Working Women*, No. 96-3 (Oct. 1996) (the City of Tacoma, Washington initiated a broad-based domestic violence educational campaign in 1995 targeted at its 180,000 citizens and 3,500 employees).

In light of the compelling evidence that domestic violence directly and detrimentally interferes with women's employment, there can be no question that Congress rationally concluded that it interferes with interstate commerce. *Cf. New York v. United States*, 505 U.S. 144,

158 (1992) (recognizing that activities that affect the national economy are within Congress's power to regulate under the Commerce Clause).

C. Gender-Based Violence Affects Interstate Commerce by Creating Tremendous Needs for Medical and Governmental Services.

Congress also found that gender-based violence affects interstate commerce by draining the nation's medical services and increasing the need for government services. *See, e.g., Violence Against Women: Victims of the System, Hearings Before the Senate Judiciary Committee*, 102nd Cong. 240 (1991) (*"1991 Violence Against Women Hearing"*) (medical costs related to domestic violence are an estimated $100 million annually) (testimony of National Federation of Business and Professional Women); *1991 Violence Against Women Hearing*, at 65 (one-third of women seeking emergency treatment in Illinois have been severely beaten by a husband) (statement of 1991 Illinois Attorney General Roland Burris); *Violence Against Women, Hearings Before the Subcommittee on Crime and Criminal Justice of the House Judiciary Committee*, 102nd Cong. 64 (1992) (*"1992 Violence Against Women Hearing"*) (then-Surgeon General Koop is quoted as describing domestic violence as the number one health problem for women); 1990 S. Rep. ("as many as 50% percent of homeless women and children are fleeing domestic violence"). In urging Congress to pass VAWA, the State Attorneys General noted these costs of domestic violence: "State and local governments, law enforcement agencies, courts, schools, domestic violence shelters and safe homes have borne the tremendous burdens caused by gender-based

violence." *See 1993 Crimes of Violence Hearing* at 34-36 (letter from 41 Attorneys General from 38 States, the District of Columbia, and two territories). Recent national, state, and local reports strongly corroborate the congressional findings – as well as the Attorneys General's supportive statement – concerning the tremendous costs resulting from gender-based violence.

The medical costs arising from violence against women are significant and burden state and local government directly through government-subsidized health care and indirectly as employers. *See* Michael A. Rodriguez, et al., *Screening and Intervention for Intimate Partner Abuse: Practices and Attitudes of Primary Care Physicians*, JOURNAL OF THE AMERICAN MEDICAL ASS'N, 282:468-74 (1999) ("compared with women with no history of abuse, abused women have higher levels of health care use . . . 31% to 54% of female patients seeking emergency services, 21% to 66% of those seeking general medical care, and up to 20% of those seeking prenatal care report experiencing intimate partner abuse.")(citations omitted); Michael Rand, *Violence Related Injuries Treated in Hospital Emergency Room Departments* 5 (1997) (in 1994, approximately 67% of women seeking injury-related treatment in hospital emergency rooms were there because of injuries inflicted by a current or former spouse, an intimate partner, or an acquaintance); American Medical Ass'n Council on Scientific Affairs, *Violence Against Women: Relevance for Medical Practitioners*, JOURNAL OF THE AMERICAN MEDICAL ASS'N, 267: 3184-89 (1992) (1.5 million women seek medical treatment related to abuse annually); Lawrence A. Greenfield, et al., Washington D.C. Bureau of Justice Statistics, U.S. Dep't of Justice, *Violence by Intimates: Analysis*

of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends 21 (1998) (the average yearly loss incurred by female victims of intimate violence in the form of medical expenses is $61 million); Harris Meyer, *The Billion Dollar Epidemic*, AMERICAN MEDICAL NEWS (Jan. 6, 1992) (a study at Rush Medical Center estimated an average charge for medical services to abused women, children, and older people as $1,633 per person per year, excluding psychological or follow-up costs); Ted R. Miller, et al., *Victim Costs and Consequences: A New Look* (Nat'l Institute of Justice) (1996) at 1, 19, 23 (the total costs suffered by the victims of rape are greater than costs suffered by other victims of violent crime; the estimated cost of rape to its victims is $127 billion per year; government bears a significant portion of the costs through restorative and emergency services to victims, health insurance payments, and lost tax revenues and Medicare and Medicaid payments); *see also* note 2 *supra*.

Violence against women also greatly increases the need for state government welfare services. Recent studies establish that a significantly greater percentage of women who receive Aid to Family with Dependent Children (AFDC) benefits are victims of domestic violence and that domestic violence is a significant factor in preventing women from returning to work and achieving economic self-sufficiency. *See* Raphael & Tolman, *supra* note 3 at 5, 33 (four recent studies of welfare recipients "document large and consistently high percentage of women on AFDC currently embroiled in violent relationships" and "[s]everal of the studies report interference from intimate partners with education, training and work as well as arguments about child support, visitation and

child custody which can prevent abused women from using child care necessary for employment or deter them from getting other needed support") (citations omitted); *see also* Susan Pennell, et al., San Diego Association of Governments, *The Nature and Scope of Violence Against Women in San Diego* at 37 (over one-third of the women at domestic violence shelters in San Diego reported receiving welfare or social security) (September 1999 Draft).

Other state and local governmental services that are necessary because of violence against women include assistance to homeless and emergency shelters and law enforcement and court services. For information on the costs and need for shelters, *see, e.g.*, Women & Housing Task Force, *Unlocking the Door: A Call to Action, Battered Women* (September 1996) (citing Elizabeth Schneider, *Legal Reform Efforts for Battered Women: Past, Present and Future* (prepared for the Ford Foundation, July, 1990)) (of all homeless women and children, 50% are fleeing domestic violence); Francine G. Hermelin, *Women Shelters: Demand Up, Donations Down*, WORKING WOMEN (November 1994) (The Women Against Abuse Center in Philadelphia reported an annual budget of $2.5 million or $68 per person per day); Sharon Chanley & Jesse Chanley, Jr., *Cost/Benefit Analysis of Domestic Violence Shelter Services* 1 (March 1999) (unpublished manuscript on file with Arizona State University) (total annual costs for Kingman Aid to Abused People Shelter including public assistance was $356,823 to $841,710); Arizona Dep't of Economic Security, *Highlights of the Uniform Family Violence Program* (from July, 1997 to June 30, 1998, crisis shelter and counseling was provided to 7,010 women and children who received 107,920 nights of emergency shelter in Arizona).

For information relating to criminal justice costs, *see, e.g.*, Chicago Police Department, *Domestic Violence Fact Sheet, Staff Support for the Coordinating Council* 1 (in 1995, Chicago police responded to nearly 153,000 domestic violence-related calls for service – an average of 419 per day); *id.* at 2 (in 1995, nearly 2,500 domestic-related reports were filed by Chicago police per month, which the Cook County State's Attorney's Office reports is an increase of 30% from the previous year); Wisconsin Dep't of Justice, *1997 Wisconsin Domestic Abuse Incident Report* at 10 (1999) (17,528 arrests for domestic abuse in Wisconsin in 1997); Nancy Cross Dunham & Linda Leetch, *The Health Care Components of Domestic Violence and Abuse: Implications for Wisconsin Providers and Health Care Systems*, at 2 (1996) (in Wisconsin in 1993 there were over 32,000 reports of domestic violence to law enforcement); Marianne Zawitz, U.S. Dep't of Justice, *Violence Between Intimates: Domestic Violence* 8 (1994) (20,170 male prisoners were incarcerated for harming an intimate in 1991); Phoenix Police Dep't, Family Investigations Unit, *Uniform Law Enforcement Domestic Violence Statistical Reports* (Quarterly reports, 1999) (Phoenix police responded to 557 calls for service of domestic violence-related orders of protection from January through September, 1999.)

Domestic violence also affects the well-being of our nation's children, directly harming our most precious resource, and creating a need for increased services to those children. *See, e.g.*, American Psychological Ass'n, *Violence and the Family: Report by the American Psychological Association Presidential Task Force on Violence and the Family*, at 80 (1996) (domestic violence is strongly correlated with child abuse – between 40% and 60% of men

who abuse their female partners also abuse their children); *id.* at 40 (fathers who batter mothers are two times more likely to seek sole physical custody of their children than non-violent fathers); Elnat Peled, et al., *Ending the Cycle of the Violence: Community Responses to Battered Women* at 4-5 (1995) (children who witness domestic violence are at a high risk for anxiety and depression and exhibit more aggressive, antisocial, inhibited, and fearful behaviors); Howard Holtz & Kathleen Furniss, *The Health Care Provider's Role in Domestic Violence*, TRENDS IN HEALTH CARE, LAW & ETHICS, 8:47 (1993) (25 to 45% of women who have experienced battering during pregnancy have an increased chance of miscarriage, pre-term labor, and giving birth to infants with low birth weight); Staff of the House of Representatives Committee on Ways and Means, 105th Cong., *1998 Green Book: Background Material and Data on Programs Within the Jurisdiction of the Comm. on Ways and Means* 784, 790 (1998) (of the 235,000 children in foster care (1996 estimate), an estimated fifty percent are victims of abuse).

Because of the staggering costs stemming from violence against women, including the increase in need for governmental services and the increase in medical and insurance costs, Congress rationally concluded that it affects interstate commerce. *See* H.R. Conf. Rep. No. 103-711, at 385 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853 (crimes of violence motivated by gender have a substantial effect on interstate commerce by diminishing national productivity, increasing medical and other costs, and decreasing the supply and the demand for interstate products). Because Congress rationally concluded that violence against women has a direct and substantial

impact on interstate commerce, the Commerce Clause allows regulation of this activity even though it is not itself "economic."

II. The Remedy Congress Chose Is Particularly Appropriate, Given the States' Experience with Gender-Motivated Violence.

Once the Court is satisfied that the problem addressed by Congress has a substantial impact on interstate commerce, the remaining inquiry under the Commerce Clause is "whether the means selected by Congress were reasonable." *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 283 (1981). VAWA's civil remedy is particularly reasonable and appropriate in light of the evidence before Congress that the States' efforts to combat gender-motivated violence, while substantial, are not sufficient by themselves to eradicate this deeply entrenched problem. *See id.* at 280 (citing congressional finding of inadequacies in state laws as support for legitimacy of federal legislation). The remedy that Congress chose is a necessary complement to the States' continuing efforts to redress gender-motivated violence, and also comports with the federal government's recognized role in protecting civil rights.

A. Congress Had Substantial Evidence Before It That the States' Own Efforts to Combat Gender-Motivated Violence Have Been Inadequate.

The States' own assessments of their legal responses to violence against women demonstrate that state protections remain inadequate, and thus support congressional

enactment of VAWA's civil remedy. While considering VAWA, Congress had before it the reports of some twenty-one States where task forces or similar bodies had been appointed, usually by the State's judicial branch, to examine the degree to which women could count on the protection of state courts. *See* S. Rep. No. 102-197 at 43 n.40 (1991) (citing state reports) (generally, the "State Task Force Reports"); 1993 S. Rep. at 45 n.29, 46 n.35 & 49 n.52 (same). Many of these state task forces described how after years of neglecting domestic violence, their legislatures had adopted statutes to provide effective remedies, including orders of protection, for its victims. Yet, State after State echoed the findings of the New York task force: while the statutory framework appeared adequate to protect women from violence in their homes, this "abstract efficacy stands in stark contrast to the reality some women face when seeking court-ordered protection." New York Task Force on Women in the Courts, *Report* 32 (1986) ("New York Task Force Report").[5]

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[5] In this respect, the legislative record of VAWA is parallel to the record supporting the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248 ("FACE"), the constitutionality of which has been upheld every time it has come before a federal court of appeals. *United States v. Weslin*, 156 F.3d 292, 296 (2d Cir. 1998), *cert. denied*, 119 S.Ct. 804 (1999); *Hoffman v. Hunt*, 126 F.3d 575, 588 (4th Cir. 1997), *cert. denied*, 523 U.S. 1136 (1998); *United States v. Bird*, 124 F.3d 667, 682 (5th Cir. 1997), *cert. denied*, 523 U.S. 1006 (1998); *Terry v. Reno*, 101 F.3d 1412, 1418 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1264 (1997); *United States v. Dinwiddie*, 76 F.3d 913, 921 (8th Cir.), *cert. denied*, 519 U.S. 1043 (1996); *United States v. Wilson*, 73 F.3d 675, 686 (7th Cir. 1995), *cert. denied*, 519 U.S. 806 (1996); *Cheffer v. Reno*, 55 F.3d 1517, 1521 (11th Cir. 1995); *see also Hill v. Thomas*, 973 P.2d 1246 (Colo. 1999) *cert. granted by Hill v. Colorado*, 67 U.S.L.W. 3718 (No. 98-1856) (U.S. Sep. 28, 1999). FACE, like VAWA, reaches local, private, non-commercial acts that Congress found had substantial effects on interstate commerce. *Compare* S. Rep. No. 103-117, at 19, 31 (1993) (FACE) *with* H.R. Conf. Rep. No. 103-711, at 385, *reprinted in* 1994 U.S.C.C.A.N. 1853. Congress in each instance found that local and state law enforcement had thus far been unable to prevent the deprivation of civil rights at issue, notwithstanding the fact that laws existed which on their face were sufficient to address the targeted conduct. *Compare* S. Rep. No. 103-117, at 19-21 (FACE) *with* 1993 S. Rep. at 49-50 (VAWA).

Florida, for example, characterized its justice system's overall response to domestic violence as "extremely deficient," Florida Supreme Court Gender Bias Study Commission, *Report* 103 (1990), and found that while statutes offered adequate protection against domestic violence, "law enforcement throughout Florida, with some notable exceptions, fails to enforce these statutes." *Id.* at 107-09. Likewise, the Michigan task force found "compelling evidence to conclude that domestic abuse victims do not receive the relief, either civil or criminal, that our legislature intended to provide." Michigan Supreme Court Task Force on Gender Issues in the Courts, *Final Report* 35 (1989). *See also* Supreme Court of Georgia, *Gender and Justice in the Courts* 5 (1991) (despite state law authorizing warrantless arrest where probable cause exists that act of family violence occurred, police "continually refuse to arrest the batterer at the scene"); *id.* at 29-30 (noting inadequate implementation of Georgia's Family Violence Act provisions for temporary protective order); Illinois Task Force, *Gender Bias in the Courts* 19 (1990) ("there remain pervasive problems in the attitudes of those charged with enforcement" of Illinois's Domestic Violence Act enacted in 1982); Louisiana Task Force on

Women in the Courts, *Final Report* 84-92 (1992) (discussing at length inadequate implementation of Louisiana's Domestic Abuse Assistance Act, resulting in inadequate or nonexistent protection of many domestic violence victims); Maryland Special Joint Committee, *Gender Bias in the Courts* 1, 11-14 (1989) ("many women seeking civil and criminal relief against their batterers still face barriers within the judicial system"); Massachusetts Supreme Judicial Court, *Gender Bias Study of the Court System in Massachusetts* 86-91 (1989) (identifying procedural and other obstacles that prevent victims of domestic violence from being adequately protected by orders of protection); Nevada Supreme Court Gender Bias Task Force, *Justice for Women* 56-57 (1989) (finding inconsistent enforcement of 1985 domestic violence statute, so that women "continue to be disadvantaged by failure of the legal system to deal in an adequate manner with the problems of battered women"); Rhode Island Committee on Women in the Courts, *Final Report* 36 (1987) (despite "effort to provide an adequate legal framework for protecting victims" of domestic violence, barriers, including attitudes of judges, court personnel, and deputy sheriffs, "discourage victims" from using remedies); Utah Task Force on Gender and Justice, *Report to the Utah Judicial Council* 54 (1990) (finding "ineffective enforcement of domestic violence laws" by police, prosecutors, and judges, including failure to impose sanctions for violations of protective orders); Vermont Supreme Court and Vermont Bar Association, *Gender and Justice: Report of the Vermont Task Force on Gender Bias in the Legal System* 1, 3 (1991) ("Vermont Report") (finding that the State's abuse prevention act is "not being adequately implemented or enforced," and

that "domestic battering and abuse continue to be serious problems that are not adequately addressed by our legal system"); Washington State Task Force, *Gender and Justice in the Courts* 25-26 (1989) ("Washington Report") (finding that existing laws provide adequate framework for handling domestic violence cases, but that victims face barriers in obtaining and enforcing protective orders); Wisconsin Equal Justice Task Force, *Final Report* 168 (1991) (finding that victims' use of protective orders were limited by fee provisions, difficult forms, lack of legal representation, and attitudes of some court personnel).

In a similar vein, many State Task Force Reports took note of relatively recent, significant reforms in state sexual assault laws, yet found that these reforms often have little impact on the prosecution of rape when the assault is committed by someone with whom the victim is acquainted. The Minnesota Task Force found that legislative reform of that State's sexual assault statute in 1975 failed to benefit the 90% of rape victims who were acquainted with their attackers, and that "[s]ignificant numbers of serious sex offenses are not heard in court due to gender-based stereotypes about acquaintance rape." Minnesota Supreme Court Task Force on Gender Issues in the Courts, *Final Report* 57-58, 63 (1989). These findings demonstrate a tremendous gap in the remedies available to women who are victimized by sex crimes, because the vast majority of such crimes are perpetrated by an attacker who is known to the victim. *Women and Violence, Part 2, Hearings Before Senate Judiciary Comm.*, 101st Cong. 31, 35-36, 38 (1990) (statement of Mary P. Koss). *See also* New York Task Force Report at 65, 68,

78-81 (after legislative reform, rape was no longer "virtually unprosecutable," yet "problems in enforcement and protection of the victim remain," particularly when a woman is acquainted with her rapist); Vermont Report at 138 (finding that sexual assault charges may not be treated as seriously where victim is acquainted with attacker); Washington Report at 38, 45 (finding that 1975 statutory revision improved treatment of rape cases, but that "many of the old problems still persist," including failure to adequately prosecute cases, and differential treatment of cases where victim is acquainted with attacker).

The State Task Force Reports demonstrate that States' longstanding efforts to address pervasive gender-based violence – efforts that have included significant legislative changes in domestic violence and sexual assault statutes – have thus far fallen far short of eliminating a widespread problem that continues to impair women's lives and their participation in the national economy. In the light of this evidence, Congress reasonably determined that allowing women who have been victimized by gender-based violence to pursue claims against their attackers in federal court could help to remedy this problem. *See* H.R. Conf. Rep No. 103-711, at 385 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853 ("a Federal civil rights action . . . is necessary to guarantee equal protection of the laws and to reduce the substantial adverse effects on interstate commerce caused by crimes of violence motivated by gender").

B. Congress Chose a Remedy That Complements the States' Efforts to Combat Gender-Motivated Violence.

Because the remedy provided by the private right of action in Section 13981 complements state and local efforts to combat violence against women without in any way compromising those efforts, it does not undermine federalism by intruding in an area of traditional state concern. *See Lopez*, 514 U.S. at 583 (Kennedy, J., concurring) (criticizing statute there invalidated for its "tendency . . . to displace state regulation in areas of traditional state concern"). The Court therefore may uphold Congress's authority to enact VAWA without hesitation.

The crimes of violence that are actionable under VAWA's civil provision are defined by reference to existing federal and state law. 42 U.S.C. § 13981(d)(2). Thus, where no effective remedy exists for the victims of these crimes, VAWA creates one that is consistent with state law; and where a state (whether now or in the future) provides effective redress to victims of gender-motivated violence, VAWA establishes a complementary federal remedy – one that effectuates the "special societal judgment that crimes motivated by gender bias are unacceptable because they violate the victims' civil rights." 1993 S. Rep. at 50. By providing the civil remedy, Congress made it possible for gender-based violence – and its impact on interstate commerce – to be redressed now, while States continue to reform and refine their approaches to this scourge.

The potential for parallel state and federal remedies for discrimination that takes the form of gender-

motivated violence is congruent with the parallel remedies that already exist for other forms of discrimination – remedies that have been used by thousands of Americans without any diminution of principles of federalism. For example, in many states, victims of employment discrimination may bring suit under both federal law, 42 U.S.C. §§ 2000e-2000e-17, and state law. *See, e.g.*, Alaska Stat. § 18.80.200; Ariz. Rev. Stat. Ann. § 41-1463; Colo. Rev. Stat. § 24-34-402; Fla. Stat. § 760.10; 775 Ill. Comp. Stat. §§ 5/1-103 & 5/2-102; La. Rev. Stat. § 23:332; 5 Me. Rev. Stat. § 4572; N.Y. Exec. Law § 296; Texas Labor Code § 21.051.

Finally, the fact that the damage inflicted by gender-based violence spreads beyond its impact on interstate commerce does not in any way diminish congressional authority to invoke the Commerce Clause to combat it. This Court dealt squarely with this issue when it upheld the public accommodations section of the Civil Rights Act of 1964 as a valid exercise of Commerce Clause authority. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). According to the Court, the United States Senate had forthrightly acknowledged that the primary purpose of that legislation was "to vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." *Id.* at 250 (internal quotation marks and citation omitted).

> But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation, and, given this basis for the exercise of its

> power, Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.

Id. at 257. Likewise here, where a massive record has demonstrated the disruptive effect that gender-motivated violence has on interstate commerce, Congress is free to act against violence that "not only wounds physically, it degrades and terrorizes, instilling fear and inhibiting the lives of all those similarly situated," by recognizing this violence "for what it is – a hate crime." 1993 S. Rep. at 49 (internal quotation marks and citations omitted).

CONCLUSION

The Court should reverse the Court of Appeals' decision below and remand the case so that Petitioner Brzonkala may proceed with her Section 13981 claim against Respondents.

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